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Indiana Law Journal

Volume 1 | Issue 3

Article 6

3-1926

# Progress and the Constitution, by Newton D. Baker

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## Recommended Citation

Willis, Hugh E. (1926) "Progress and the Constitution, by Newton D. Baker," *Indiana Law Journal*: Vol. 1: Iss. 3, Article 6.  
Available at: <http://www.repository.law.indiana.edu/ilj/vol1/iss3/6>

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## BOOK REVIEWS

*Progress and the Constitution.* By Newton D. Baker. Charles Scribner's Sons, New York. 1925. Pp. 94. Price \$1.25.

This little book consists of a series of three lectures delivered in 1925 by Newton D. Baker at the University of Virginia on The William H. White Foundation.

The book is an interesting, popular, but brief discussion of a number of important changes in the United States Constitution and United States constitutional law, which have occurred since the adoption of the original Constitution. It is neither a treatise upon constitutional law in general, nor upon any specific topic, or principle, of constitutional law, unless an exception is made in favor of chapters two and three. In Chapter II, which Mr. Baker has named "The Constitution and Industry" but which he ought to have named "The Breakdown of Our Dual Form of Government," Mr. Baker has given a fairly adequate treatment of the consolidating tendencies in our country, the growth of problems of national concern, the gradual transfer of the police power of the states to the federal government, the greater socialization of the law, and the enlargement of the powers of the national government at the expense of the governments of the states. In Chapter III, which Mr. Baker has named "The Constitution and Foreign Relations" but which he might as well have named "The Breakdown of the Treaty Making Clause of the Constitution." Mr. Baker has shown satisfactorily how this clause has been the cause—as he thinks largely because of the requirement of a two-thirds vote of the Senate—of a constant contest throughout our history between the executive branch of the government and the Senate; and how it is liable in the future to cause greater difficulties because many obligations of treaties are not enforceable without the concurrence of the House which has no power over the ratification of treaties, and because treaties are subject to review by the Supreme Court of the United States.

From such statements as "Jefferson feared that the divergent interests of widely scattered peoples would be stronger than any national spirit," "Jefferson feared the breaking up of the country into separate and independent states," "Jefferson did not foresee the swift and revolutionary changes," "To Jefferson we were a nation of farmers," "Had Jefferson been able even faintly to imagine," etc., and from the fact that he does not once refer to Chief Justice John Marshall, one would be justified in concluding that Mr. Baker thought that Mr. Jefferson was entitled to credit for both the form and substance of the Constitution and for all that John Marshall did toward laying the foundations of our government; but perhaps he will have to be pardoned for this because of the fact that he first delivered the lectures found in this book at the university founded by Thomas Jefferson.

Mr. Baker defines the word "Progress," as he uses it, as "a condition of change"—rapid, fundamental and permanent, "without stopping to inquire whether the change is in itself for better or for worse." In other words, the real title of his book is "Change and the Constitution." Since his purpose was to discuss "changes" in the Constitution and constitutional law, one cannot help but wonder why he chose to use the word "progress." We should like to have had Mr. Baker's evaluation of the changes which have occurred in our constitutional history, but why should he refuse to give it to us and at the same time raise our hopes by such a word as "progress"?

While the book cannot be recommended for classroom use, or for collateral study, it can be recommended to the general reader.

HUGH E. WILLIS.

*Effective Regulation of Public Utilities.* By John Bauer. The MacMillan Company. New York. 1925. Pp. VIII, 381.

The author of this book is concerned not so much with the law of the present as with the policies that shall underlie the law of the future. Mr. Bauer fully realizes that governmental regulation of public utilities is here to stay and that the category of utilities is likely to be broadened as time goes on to include industries and activities now free from supervision. He recognizes, however, that regulation in the past and present has not attained the efficiency which it should. The process of regulation, he finds, has been expensive, dilatory and cumbersome; confusion as to the basic principles has become worse confounded through much litigation; and this litigation has stirred up useless and deplorable antagonism between the utilities, the regulatory bodies, and the public.<sup>1</sup>

The chief storm-center has, of course, been the rate-making function, with its vexed questions of "valuation" and "confiscation." Mr. Bauer feels strongly that this is the point at which regulation under present conditions is failing and that it is essential to successful regulation that the rate making process "be made definite and practically automatic," something which he considers to be entirely within the bounds of the attainable.<sup>2</sup> This is not a new suggestion, of course.<sup>3</sup> Neither is there novelty in the proposal to make the process automatic through the adoption of the actual cost of the plant (or prudent investment) as the rate base. The desirability of this basis has been urged by the majority of recent commentators upon the subject in legal periodicals,<sup>4</sup> with here and there a dissenting voice,<sup>5</sup> and Mr. Justice Brandeis' great exposition of it must always be kept in mind.<sup>6</sup> The valuable thing is that Mr. Bauer provides us with a detailed scheme for establishing actual cost as the rate base, giving fairly the arguments for and against his proposals and the reasons why he thinks they should be adopted. The author's broad experience entitles his recommendations to earnest and thoughtful consideration.

Mr. Bauer believes that it is the duty of the legislature to define in detail the policy of the state as to valuation and rate making, leaving to the

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<sup>1</sup> See the author's comments on page 11 and 45. See also the preface, page v.

<sup>2</sup> Pages 34, 104.

<sup>3</sup> "Is it impossible to make the value of a plant a matter of bookkeeping, to be settled by a rule of thumb, if you please, with a result that is fair and not utterly speculative?" Edwin C. Goddard, *Public Utility Valuation*, 15 Mich. Law Rev. 205, 220.

<sup>4</sup> Edwin C. Goddard, *Public Utility Valuation*, 15 Mich. Law Rev. 205; *Fair Value of Public Utilities*, 22 Mich. Law Rev. 652, 777. Robert L. Hale, *The Physical Value of Fallacy in Rate Cases*, 30 Yale Law Jour., 710. Donald R. Richberg, *The Supreme Court Discusses Value*, 37 Harv. Law Rev. 289; *A Permanent Basis for Rate Regulation*, 31 Yale Law Jour. 263. Robert H. Whitten, *Fair Value for Rate Purposes*, 27 Harv. Law Rev. 419.

<sup>5</sup> Hillier Blake Brown, *The Defects in Mr. Justice Brandeis' Theory of Prudent Investment as a Rate Base*, 12 Calif. Law Rev. 283. Frederic G. Dorety, *The Function of Reproduction Cost in Public Utility Valuation and Rate Making*, 37 Harv. Law Rev. 173.

<sup>6</sup> *State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission*, (1923) 262 U. S. 276, 289, 67 L. Ed. 981, 985.